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No. 85-140

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MICHAEL BOWERS, et al.,
Petitioners

v.

MICHAEL HARDWICK, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF DAVID ROBINSON, JR. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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SCIENTIFIC BOOKS AND ARTICLES:

2 Cecil, Textbook of Medicine (16th ed., 1982).....27, 28

Centers for Disease Control, Morbidity and Mortality Weekly Report, Vol. 34, No. 22 (1985).....28

J. Curran, et al., The Epidemiology of Aids: Current Status and Future Prospects, 229 Science 1352 (Sep. 27, 1985).....10, 33

Page(s) Cited

V. Devita, Jr., S. Hellman, and S. Rosenberg, eds., AIDS, etiology, diagnosis, treatment, and prevention (1985).....10

J. Goedert and W. Blattner, The Epidemiology of AIDS and Related Conditions, in V. Devita, Jr., et al., AIDS.....16, 21, 24, 26

N., Hennessey, AIDS--What the Family Physician Needs to Know, Medical Aspects of Human Sexuality, Vol. 19, No. 9 (Sept. 85).....26

J. Langone, AIDS, Discover (Dec. 1985); Morbidity and Mortality Weekly Report, Centers for Disease Control, Vol. 34, No. 22 (1985).....26, 28

C. Marwick, Blood Banks Give HTLV-III Test Positive Appraisal at Five Months, 254 Journal of the American Medical Association 1981 (Oct. 4, 1985).....14

F. Redlich and D. Freedman, The Theory and Practice of Psychiarty (1966).....31

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SCIENTIFIC PRESENTATIONS:

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OTHER AUTHORITIES:

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K. Menninger (with M. Mayman and P. Pruser), The Vital Balance (1963).....31

J. Nowak, R. Rotunda, and J. Young, Constitutional Law, (2d ed., 1983).....9

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October Term, 1985

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MICHAEL HARDWICK, et al.,

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On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF DAVID ROBINSON, JR. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is filed pursuant to Rule 36.2 of this Court with the consent of the parties, on file with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The writer of this brief was engaged in a study of what the legal system might do to help reduce the devastating rate of spread of the AIDS virus when the Court granted certiori in this case. As counsel for petitioners indicated that they would probably not raise the public health concerns before this Court, the author of the present brief decided to do so individually, to present what is believed to be a vitally important dimension of the problem before the Court for its consideration.

SUMMARY OF ARGUMENT

This is a brief of limited focus. It does not argue the important questions of standing, facial invalidity adjudication, historical and contemporary ethical and religious values, federalism, or whether, as a general matter, constitutional privacy protections should be extended beyond their traditional boundaries of procreational freedom to include protection of alternative "life-styles." Instead, it is directed to potential relationships between the decision below and a contemporary catastrophe of historic proportions, the AIDS virus crisis. At present, it is thought that nearly two million Americans are infected, although only

about 15,000 have experienced AIDS, which is simply a terminal phase of an AIDS virus infection. The number of additional people being infected is estimated at perhaps 1000 to 2000 each day. All are believed likely to be infected for life. Many of them will develop AIDS, brain disease, or other devastating AIDS-related illnesses. For various technical reasons, no effective vaccine or treatment is likely to be available in the foreseeable future. The only rational means of responding to this extraordinary tragedy is to change our behavior. The behavior believed to have infected about three-fourths of the victims is sodomy, the subject of the Georgia statute which is under attack in this case. While it is not claimed that the existance of such

statutes is a panacea for dealing with our medical crisis, it is urged that the states should be permitted to reassert traditional values, both to reinforce societal attitudes with respect to what we know to be potentially lethal behavior (whether homosexual or heterosexual), and to permit additional public health responses, such as closure of bathhouses and bars where promiscuous, extraordinarily risky sexual activity takes place. We must be able do what we can, for every AIDS case prevented will save a human life.

In addition, it is urged that the strict scrutiny of the sodomy statute ordered by the lower court constitutes an inappropriate standard of judicial review. The intensity of the state's

interest in protecting the public health should be considered in deciding whether sodomy is a "fundamental right" with a concomitant strong presumption of unconstitutionality with respect to the sexual behavior component of any legal effort to respond to the AIDS virus peril. The alternative to permitting rational actions based on necessarily incomplete information is to tie our hands while thousands become ill and die. Unlike the abortion cases, where the medical evidence indicated that early abortion was no more (and perhaps less) dangerous to maternal health than childbirth, the constitutional freedom to commit sodomy urged upon the Court by the respondents would be dangerous indeed.

Finally, this is not a homophobic brief. It is a labor of love, an effort to help keep homosexuals, and the rest of us, alive.

ARGUMENT

EPIDEMIOLOGICAL CONCERNS, EVIDENCED BY THE AIDS TRAGEDY, ARE INCONSISTENT WITH A RECOGNITION OF A CONSTITUTIONAL RIGHT TO ENGAGE IN SODOMY.

A. The Scope of this Brief

This brief has a limited scope. It does not seek to discuss a number of important issues presented by this case such as (1) the questionable standing

of the respondent (see Los Angeles v. Lyons, 461 U.S. 95 (1983)); (2) the inappropriateness of ruling on the Georgia statute on its face (see Broadrick v. Oklahoma, 413 U.S. 601 (1973)); (3) the historical universality of sodomy prohibitions, and their continued widespread support in the ethical values of contemporary America;[1] and (4) the undesirability of extending constitutional privacy protections beyond the established procreational freedoms to more general

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[1]Four years ago, Congress overwhelmingly rejected an effort to eliminate the sodomy prohibition in the District of Columbia (Washington Post, Nov. 5, 1985, at A5, col. 3.)

matters of lifestyle.[2] Instead this brief is intended to assemble information which may assist the Court in assessing the public health implications of the lower Court's decision (a matter which that court failed to address) and the serious epidemiological concerns which would be heightened if the ruling below were affirmed and imposed on the nation as a whole

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[2]See J. Nowak, R. Rotunda, and J. Young, Constitutional Law, 758 (2d ed., 1983): "...(T)he Court has never indicated that there is any constitutionally guaranteed right to live a particular 'lifestyle.'"

B. The Nature and Epidemiology of AIDS

Acquired immune deficiency syndrome (AIDS) was first medically reported slightly over four years ago, in 1981.[3] Due to a remarkable scientific effort, much is known about AIDS, despite the limited time which has been available to scientific investigators.[4]

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[3]J. Curran, et al., The Epidemiology of AIDS: Current Status and Future Prospects, 229 Science 1352 (Sep. 27, 1985.)

[4]Perhaps the most generally useful single source of current information is V. DeVita, Jr., S. Hellman, and S. Rosenberg, eds., AIDS, etiology, diagnosis, treatment, and prevention

The term "AIDS" was first applied to patients with certain rare cancers and infections prior to the determination of the transmissible agent which was the underlying cause of their illnesses. Much confusion has

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[4] (cont'd) (1985). Drs. DeVita and Rosenberg are respectively the Director and Chief of Surgery of the National Cancer Institute, National Institutes of Health; Dr. Hellman is physician-in-Chief of the Memorial Sloan-Kettering Cancer Center. The contributors are scientists who have been primarily responsible for our knowledge of AIDS. The technical literature is very large; the most recent quarterly Literary Search of the National Library of Medicine (No. 85-16) includes 747 citations. A very recent book designed for lay readers is J. Slaff and J. Brubaker, The Aids Epidemic (Dec. 1985.) Dr. Slaff is a medical investigator for the National Institutes of Health.

resulted. Today, AIDS is properly seen as simply the terminal phase of an infection by a virus which has been variously termed human T-lymphotropic virus type III (HTLV-III), lymphadenopathy-associated virus (LAV), or AIDS-associated retrovirus (ARV). For simplicity, it will be referred to here as the AIDS virus. After a person is infected with the AIDS virus, it enters certain blood cells which are vital to the immune system (called helper T lymphocytes) and multiplies there. Although brief influenza-like symptoms are often experienced, this first stage of an AIDS virus infection is commonly referred to as the "asymptomatic carrier state."[5]

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[5]Address by Dr. A. Fauci, Director,

From the standpoint of epidemiological concern, persons who are in the asymptomatic carrier state are of far greater importance than persons with AIDS, since (1) people in the former group are approximately 200 times as numerous, (2) their blood tends to contain greater concentrations of virus, and (3) being asymptomatic, they are more likely to be unaware of their infection and more vigorous in the contagion of their virus to others.

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[5] (cont.d) National Institute of Allergy and Infectious Diseases, National Institutes of Health before the Institute of Medicine of the National Academy of Sciences, Oct. 16, 1985.

The diagnosis of persons in the asymptomatic carrier state has been greatly facilitated recently by the development of two blood antibody tests. While it is common for the popular press to report that persons whose blood produces a positive response in both tests have been "exposed" to the AIDS virus, largely to reduce the consequent state of alarm, the medical community accepts such seropositivity as presumptive evidence of current infection and infectivity.[6] Live virus can be cultured from the blood of about 60

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[6] C. Marwick, Blood Banks Give HTLV-III Test Positive Appraisal at Five Months, 254 Journal of the American Medical Association 1981 (Oct. 4, 1985).

percent of seropositive individuals on the first try, and more can be cultured on repeated attempts. The AIDS virus can incorporate itself into the genetic material of the cells and remain latent there for varying and unknown periods, and free virus cannot be cultured at all times from some infected individuals.

The second phase of AIDS virus illness used to be called pre-AIDS or lesser AIDS, but since the prognosis for progression to full-blown AIDS is unknown, today the description "AIDS-related complex" (ARC) is commonly preferred. Under the definition adopted for surveillance purposes by the Centers for Disease Control (CDC), ARC is to be used for

patients with non-lethal symptoms of an AIDS virus infection, including persistent fever, lymphadenopathy (enlarged lymph nodes), diarrhea, weight loss, fatigue, and night sweats.

Under the CDC definition, full-blown AIDS is a diagnosis reserved for persons with additional diseases, including Kaposi's sarcoma (a previously-rare type of cancer), pneumocystis carinii pneumonia (a previously-unusual pneumonia caused by a protozoa), and primary lymphoma (lymphoid cancer) of the central nervous system.[7] While AIDS is

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[7] J. Goedert and W. Blattner, The Epidemiology of AIDS and Related Conditions, 2, in V DeVita, Jr., et al, AIDS, supra, note 4.

sometimes popularly thought of as only itself a blood disease, the AIDS virus (in addition to secondary invading agents) causes devastation to the brains of a substantial percentage of patients.[8] Indeed, it has been observed that if a successful therapy is developed to eliminate the virus in the blood and restore the immune system, we may be faced with a large population of demented patients, whose central nervous systems have been gravely damaged by the virus, and who would not be subject to effective medication even if it were developed,

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[8]Grim New Ravage of AIDS: Brain Damage, New York Times, Oct. 15, 15 C1.

because of the blood-brain barrier.[9]

Estimates of the number of people in the United States who have been infected with the AIDS virus vary between 500,000 and 3,000,000. A very recent effort reported in the New England Journal of Medicine[10] put the figure at about 1,765,000. A Public Health Service source unofficially estimated that this number was currently increasing by perhaps 1000 to 2000 persons per day.[11]

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[9]Address by Dr. R. Johnson, Eisenhower Prof. of Neurology, Johns Hopkins University, before the Institute of Medicine of the National Academy of Sciences, Oct. 16, 1985.

[10]Vol. 313, p. 1352, Nov. 21 1985.

[11]New York Times Oct. 1, 1985 at C1, col. 1.

The number of persons whose disease progresses from the asymptomatic carrier state to full AIDS is estimated at 5 to 20 percent within five years. It is estimated that an additional 25 percent will develop ARC within the same period.[12] (Projections beyond five years cannot now be made.) The number of persons with ARC whose illness will subsequently progress to full AIDS is unknown, but is assumed to be substantial. Slaff and Brubaker estimate that by the end of the decade American will have more than 250,000 full-AIDS patients with more than $35 billion in direct medical costs.[13]

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[12]See Slaff and Brubaker, supra, note 4 at 48.

[13]Id. at 89.

Heartbreaking other costs are also endured. People with antibody positivity are probably infected for life. This is the experience with other similar viruses. Women who are infected are advised by the CDC to "postpone" pregnancy. (Washington Post, Dec. 6, 1985, p. A.3) The danger of infection of babies is unquantified but high. Men who are seropositive risk both the infection of their sexual partners and their offspring. Many seropositive individuals will doubtlessly decide not to marry. For all, there is a danger that the infection will progress to ARC or full AIDS, an illness from which none has recovered. Indeed, at least half of

AIDS patients can be expected to die within 18 months of diagnosis and 80 percent within 36 months of diagnosis. (J. Goedert and Blattner, in V. Devita, Jr., op.cit. supra, note 4, at 11.) One researcher described AIDS as follows:

> "With other diseases you die very fast. This is just horrible, a dwindling of the healthy body. I've worked with miserable diseases, but none as miserable as this."[14]

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[14]Washington Post, Mar. 17, 1983, at A1.

C. The prognosis for an AIDS Virus Vaccine or for Effective Therapy in the Foreseeable Future is Poor.

As antibiotics and other traditional therapies are ineffective against viral diseases, medical hope rests heavily on the possibility of developing an effective vaccine. With the AIDS virus, this task is greatly complicated by the ability of the virus to mutate into varying forms (like influenza viruses), and it is likely that a vaccine which might be effective against some varieties of the virus would be ineffective against many others. Dr. J. Slaff and J. Brubaker

note that 18 variants have been isolated thus far and state:

> While denial and disbelief are understandable actions, the notion that medical science is on the verge of a breakthrough that will soon end this epidemic is dangerously delusional.
>
> The truth is that those closest to the problem do not expect an effective treatment program within the decade. Presently, an AIDS virus vaccine is inconceivable."[15]

D. The Means of the Spread of the AIDS Virus

Approximately three out of four American AIDS patients have been homosexual males.

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[15] Op. cit. supra note 4, at 6.

TABLE 1–2. Total Number of U.S. Cases of AIDS Reported to the Centers for Disease Control, as of October 29, 1984, by Risk Group, Age Group, and Sex

	ADULT/ADOLESCENT CASES					
	MALE		FEMALE		TOTAL	
RISK GROUPS*	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
Homosexually active men	4772	78	—	—	4772	73
Parenteral drug users	891	15	238	57	1129	17
Haitians	202	3	35	8	237	4
Hemophiliacs	45	1	0	0	45	1
Heterosexual contacts†	3	0	45	11	48	1
Recipients of blood or blood product transfusions	44	1	33	8	77	1
None of the above/other	171	3	70	17	241	4
Total	6128	100	421	100	6549	100
	PEDIATRIC CASES‡					
Parents with AIDS or at increased risk for AIDS	23	55	23	79	46	65
Hemophiliacs	4	10	0	0	4	6
Recipients of blood or blood products transfusions	10	24	2	7	12	17
None of the above/other	5	12	4	14	9	13
Total	42	100	29	100	71	100

*Risk groups listed are ordered hierarchically; cases with multiple characteristics are tabulated only in the group listed first.

†With a person with AIDS or at risk for AIDS

‡Includes patients under 13 years of age at time of diagnosis

[16] J. Goedert and W. Blattner; in DeVita, Op. cit. supra, note 4 at 7.

In the years since the table was prepared, the cases have more than doubled in number, but the relative distribution has remained constant. Haitians have been removed from the list as a separate group, since on closer evaluation it has been found that infected Hatians can be placed in other risk groups. (For example, due to poverty, many normally heterosexual male Haitians have served as homosexual prostitutes.)

The most "efficient" means of transfer of the AIDS virus infection (other than by blood transfusion) appears to be anal intercourse. The rectum, unlike the vagina, is relatively fragile, with many surface blood vessels and without natural

lubrication. The penis is also relatively exposed to infection in this situation.[17] Less efficient, though still classed as types of "unsafe sex." include fellatio, fisting (forcing the fist into the rectum), and cunnilingus.[18]

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[17]For the anatomy of AIDS virus vulnerability see J. Langone, AIDS in Discover (Dec., 1985) 28, at 40.)

[18]See J. Goedert and W. Blattner, The Epidemiology of Aids and Related Conditions in DeVita, op. cit. supra, note 4, at 17; J. Slaff and J. Brubaker, op. cit. supra, note 4, at 96. There is no clear evidence as to whether all body fluids contain the virus, but it has thus far been cultured from blood, semen and saliva, and may be present in vaginal secretion and feces. N. Hennessey, "AIDS -- What the Family Physician Needs to Know" in Medical Aspects of Human Sexuality, Vol. 19, No. 9 (Sep. 85), at 22.

E. Other Diseases are Similarly Disproportionately Spread by Sodomy.

In addition to AIDS virus infection and the multitude of opportunistic infections and tumors which appear in immunocompromised patients, a number of other diseases appear disproportionately in active male homosexual populations. From 1965 to 1975, the ratio of male to female cases of syphilis in the U.S. rose from 1.6 to 1.0 to 2.5 to 1.0 In many large cities more than half of all infectious syphilis occurs in male homosexuality. 2 Cecil, Textbook of Medicine 1575 (16th ed, 1982). Gonococcal infections

of the pharynx and rectum are also common in homosexual males. Id. at 1568. Hepatitis B (formerly called serum hepatitis), has an annual attack rate on homosexuals of between 10 and 15 percent. Hepatitis B virus infections result in a significant morbidity and mortality for the active disease, and many become carriers with frequent progression to cirrhosis of the liver and primary liver cancer.[19]

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[19]Centers for Disease Control, Morbidity and Mortality Weekly Report, Vol. 34/No. 22 (1985) quoted in JAMA, July 5, 1985 at 29; J. Langone, AIDS, in Discover, 28 at 42 (Dec. 1985).

F. Recognizing a Constitutional Right to Commit Sodomy Would Both Encourage Behavior with a High Medical Risk and Compound the Difficulty of Adopting Control Strategies to Reduce the Rates of Contagion of the AIDS Virus and Other Sexually Transmitted Diseases.

Deterring undesirable behavior is probably the principal purpose of the criminal law.[20] Yet deterrence is a highly complex subject. Partly it

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[20]F. Zimring and G. Hawkins, Deterrence, The Legal Threat In Crime Control xi (1973)

represents a threat of apprehension and punishment of the individual facing a decision with respect to violation of legally-prescribed norms. Of likely greater importance in the present context is the educative function of criminal law. In responding to the current public health crisis, a state legislature should be free to conclude that there is a need for reinforcement of traditional sexual mores, not encouragement of "alternative life styles," whether homosexual or heterosexual. Law is an important teacher of right and wrong,[21] and

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[21] Id., at 77.

"[c]ultural attitudes toward adult sexual deviations undoubtedly influence their incidence." F. Redlich and D. Freedman, The Theory and Practice of Psychiatry 385 (1966). The plurality opinion of Justice Marshall in Powell v. Texas, 392 U.S. 514 (1968) noted:

> The long-stnding and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any group of people who are able to appreciate the consequences of their acts. (At 531.)

Dr. Karl Meninger observed with respect to a patient who protested that he could not avoid homosexual behavior: "Of course one thing he could do would be to live continently; there are

millions of heterosexually inclined people who are continent for one reason or another, and this should be no more difficult for a homosexually inclined individual."[22] (Of course there are many homosexually-inclined people who are continent as well.)

Incidentally, it should not be assumed that there is no medical risk even in the exchange of body fluids between seropositive individuals, since there is substantial evidence that repeated exposure to the virus (possibly because of the existence of

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[22] The Vital Balance 196 (1963) (with M. Mayman and P. Pruser).

its many variants) increases the risk of the infection progressing to full AIDS.[23] The use of condoms is often suggested, but their effectiveness in preventing viral infection is unproven.[24]

Creation of constitutional protection for sodomy would also make subsidiary strategies to reduce the spread of the virus more difficult. For example, closure of bathhouses and

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[23]Address by Dr. A. Fauci before the National Institute of Medicine, National Academy of Sciences, Oct. 16, 1985.

[24]J. Curran et al., The Epidemiology of AIDS: Current Status and Future Prospects 229 Science 1352 (Sept. 27, 1985).

sexually facilitating bars and parks has often been advocated, occasionally been ordered, but rarely been enforced. While voluntary behavior has reduced the patronage of such places in a number of cities, highly dangerous practices continue to take place in them.[25] If sodomy were declared to to be a fundamental constitutional right, measures to close

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[25]For a recent account of the continuation of unsafe behavior in a homosexual bathhouse in New York, see P. Weiss, Inside a Bathhouse, The New Republic (Dec. 2, 1985) at 12.

By one recent estimate, up to 20 percent of homosexuals still practice the riskiest sexual behavior, with multiple partners. Time, Aug. 12, 1985, p. 46.

facilities designed to facilitate sodomy would be met with the claim that they infringe upon that right. An example is provided by the New York decisions. In People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), decided six months before the first AIDS cases were reported in the United States, the New York Court of Appeals held that the state consensual sodomy prohibition was violative of the right to privacy, since "there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct." (Id., at 941, emphasis supplied.) In People v.

Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62 (Feb., 1983) the same court struck down a statute prohibiting loitering in a public place for the purpose of engaging in or soliciting deviate sexual intercourse, relying on Onofre, without rethinking its rationale in the light of the then beginning medical crisis.

At the time of the adoption of the Model Penal Code by the American Law Institute, in 1962, after extended controversy it was decided that the continuation of proscriptions of sodomy between consenting adults in private would not be recommended, even though it was then illegal in all American states; it was not thought to be dangerous to the participants or to

others. (Model Penal Code and Commentaries, Official Draft and Revised Comments, 1980, Part II, Art. 230, pp. 369-371. At the same time, the American Law Institute recommended the prohibition against prostitution be retained because of the danger of the spread of veneral disease.[26] Since that time, we have experienced a new and lethal venereal disease which is primarily spread by sodomy. Obviously, criminal proscriptions are no panacea, especially with respect to truly private conduct. Yet they can help even there, at least on the margin, and

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[26] Id., Art. 251, p. 458.

they can help additionally in settings such as sexual activity-facilitating bathhouses and bars where the risk of spread of infection is at its highest. Other measures may have to be considered as well to encourage behavioral change, because in the absence of effective vaccines or therapy, neither of which is likely for the foreseeable future, only behavioral change will help prevent the great majority of future infections.[27]

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[27]Address of Dr. J. Curran, Chief, AIDS Branch, Division of Viral Diseases, CDC before theInstitute of Medicine, National Academy of Sciences, October 16, 1985.

The legal system must do what it can, for every case of AIDS prevented will save a human life.

G. Strict Scrutiny of Sodomy Statutes Represents an Inappropriate Standard of Review, Given the Intensity of the State's Interests.

Of course, it might be contended that the epidemiological concerns are premature in the present posture of this case, since the Court of Appeals only ruled that the sodomy statute implicated a fundamental right of Mr. Hardwick, remanding the case "for

trial,[28] at which time the State must prove in order to prevail that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest."[29]

The strict scrutiny found appropriate by the Court of Appeals would create a severe presumption of unconstitutionality of state sodomy legislation. Professor Gerald Gunther

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[28]Presumably the court meant to refer only to further consideration by the trial court, as the determination would be one of legislative fact, not adjudicative fact which would require support by formal proof at trial.

[29]760 F.2d at 1213.

may have only slightly overstated the point when he referred to scrutiny which was "strict" in theory and fatal fact.[30] There is ample authority for the proposition that the nature of the state's interest affects the level of scrutiny which is appropriate. See, e.g., Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwich, 441 U.S. 68 (1979). We are faced with a public health catastrophe of historic proportions. The states must be able to act with incomplete information, for

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[30] Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, at 8 (1972).

the alternative is inaction, and inaction itself poses grave peril. To ask that legislatures act with the surgical precision which would be required by the Court of Appeals is to seek the impossible and to state that the law is to be helpless while thousands continue to be infected and to die.

The present case is quite different from Roe v. Wade, 410 U.S. 113 (1973), in which the right of a woman to terminate her pregnancy was held to be fundamental. There the court noted that the risk to the life of a woman who undergoes an early abortion under modern medical techniques appears to be "as low as or lower than the rates for

normal childbirth."[31] The medical risk of sodomy, on the other hand, is extraordinary.

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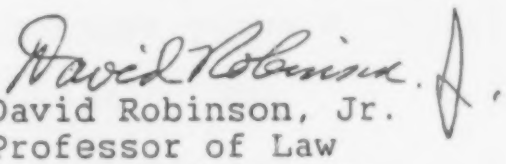
[31] Id., at 149.

CONCLUSION

For the reasons stated, it is urged that the decision of the court below be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court, and that I have served three true copies each, first class postage prepaid, this 18th day of December, 1985 to Laurence Tribe, Griswold Hall 307, Harvard Law School, Cambridge, Massachusetts 02138, attorney for respondents, and Michael, E. Hobbs, Senior Assistant Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334, Attorney for petitioner.

David Robinson, Jr.